IIN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Maribel Rosario, *et al.*, individually and on behalf of similarly situated employees,	Case No. 15-6478
Plaintiffs,	
v.	
First Student Mgmt. LLC and First Student, Inc.,	
Defendants.	

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

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I. PRELIMINARY STATEMENT

Defendants First Student Management LLC and First Student, Inc. (collectively, "Defendants") submit this reply brief in further support of their Motion to Dismiss Count II as to 74 of the 77 Plaintiffs and Counts III and IV of Plaintiffs' Amended Complaint as to all Plaintiffs, with prejudice ("Motion").

As to Count II, Plaintiffs essentially concede that 74 Plaintiffs have still not pled a plausible overtime claim based on individualized facts but inappropriately rely on case law related to managing discovery in collective actions to contend this does not matter. Because Plaintiffs' authorities do not undermine the fundamental principle that each named Plaintiff must plead facts stating their *own* plausible claims, Count II must be dismissed as to those 74 Plaintiffs.

As to Counts III and IV, Plaintiffs do not seriously contest that their Pennsylvania Wage Payment and Collection Law, 43. PA. Stat. §260.1 *et seq*. (the "WPCL"), claims are based on the collective bargaining agreements ("CBAs") Defendants submitted with their Motion. Thus, the claims must be dismissed as preempted by Section 301(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §185(a). (ECF 18). Plaintiffs' contention that the Court must postpone ruling on preemption until it determines whether the CBAs are "inextricably intertwined" with the claims is misplaced. There is, put simply, no logical way for the CBAs not to be "inextricably intertwined" with Plaintiffs' WPCL claims when the WPCL claims *require* a contractual entitlement and the CBAs *are* the contracts that create the alleged entitlement.

Accordingly, Defendants respectfully request that the Court grant their Motion.

II. PLAINTIFFS' AMENDED COMPLAINT MUST BE PARTIALLY DISMISSED

A. Named Plaintiffs Cannot Rely On Isolated Allegations Of A Few Individuals To Plausibly Plead Their Own FLSA Overtime Claims

This Court dismissed Plaintiffs' FLSA overtime claim in the initial Complaint because "legal conclusions by themselves are not sufficient to support a plausible FLSA overtime claim," and the Court's logic applies equally to require dismissal of 74 of the 77 named Plaintiffs' claims now with prejudice. (*See* ECF 12, at p. 13). Although Plaintiffs contend that their "Amended Complaint fully addresses this purported deficiency raised by the Court," the fact remains that Plaintiffs must include basic information "*about the named Plaintiffs*" to sustain their claims and they have indisputably failed to do that here for almost all of the named Plaintiffs. *Davis v. Abington Mem'l Hosp.*, 817 F. Supp. 2d 556, 565 (E.D. Pa. 2011) (emphasis added).

Plaintiffs' attempt to rely on their amended overtime allegations for only 3 of the 77 named Plaintiffs to sustain the claims of the rest fails. Plaintiffs do not seriously dispute in their opposition that 74 of the 77 named Plaintiffs have not pled individualized facts that would meet the *Davis* pleading standard if they were bringing individual FLSA overtime claims. (*See* ECF 21, at p. 12); *see also Davis v. Abington Mem'l Hosp.*, 765 F.3d 236 (3d Cir. 2014). Instead, they essentially argue that the fact that they have brought their claims as a proposed collective action somehow alters their individual pleading burdens. (ECF 21, at p. 12). The *Davis* pleading standard, however, on its face requires Plaintiffs to do more than attempt to rely on general statements or "example" evidence relating to other named Plaintiffs in support of their claims. *Davis*, 765 F.3d at 242. In fact, in *Davis*, the Third Circuit even cited with approval the Second Circuit's decision in *Lundy v. Catholic Health System of Long Island Inc.*, 711 F.3d 106 (2d Cir. 2013), which addressed allegations that were fact-specific as to each named Plaintiff yet were found deficient, and also noted that each named Plaintiff in *Davis* had presented their *own* factual allegations, which were still legally deficient. *Id.* at 241-243. It would be an odd result if in those cases individualized factual allegations were insufficient yet here all Plaintiffs could survive dismissal by relying solely on allegations pertaining to just three of the Plaintiffs. And Plaintiffs' opposition does not even mention, let alone attempt to distinguish, the other authorities Defendants cited in their motion demonstrating that each named plaintiff in a collective action must plead facts in support of their own claims. (*See* ECF 18-1 at 6 (citing authorities)).

Moreover, Plaintiffs' attempt to analogize their pleading burden to management of discovery in collective and class actions fails. None of the cases Plaintiffs cite hold that the burden to state facts supporting a plausible individual claim for each *named plaintiff* is somehow relaxed in a collective or class action.[1] In fact, in the class action context, courts have repeatedly noted the contrary: named Plaintiffs' deficient claims cannot be saved by the assertion that some absent class members may have viable claims. *See, e.g.*, *In re Wellbutrin XL Antitrust Litig.*, 260 F.R.D. 143, 152 (E.D. Pa. 2009) ("That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent") (internal citations omitted). And the authorities Plaintiffs cite actually *support* Defendants' Motion because they expressly *permit* discovery as to all *named plaintiffs* in collective actions as distinguished from pre-certification opt-ins, demonstrating that named plaintiffs have no lesser litigation burden than where they are prosecuting individual claims. *See McGrath v. City of Philadelphia*, Civ. A. No. 92-4570, 1994 U.S. Dist. LEXIS 1495, at *8 (E.D. Pa. Feb. 14, 1994) (cited by Plaintiffs, permitting discovery directed to *all of the named plaintiffs* but not all of the opt-in plaintiffs); *Morales-Arcadio v. Shannon Produce Farms*, Civ. A. No. 605-062, 2006 U.S. Dist. LEXIS 66595, at *10-11 (S.D. Ga. Aug. 28, 2006) (cited by Plaintiffs, *all of the named plaintiffs answered discovery* so the court found the defendants showed no need for additional discovery to the opt-in plaintiffs); *cf. Kuznyetsov v. West Penn Allegheny Health Sys.*, Civ. A. No. 10-948, 2014 U.S. Dist. LEXIS 150503, at *13-14 (W.D. Pa. Oct. 23, 2014) (awarding costs of collective action litigation against named plaintiffs only, including costs related to litigation of voluntarily dismissed opt-in plaintiff claims, noting "Plaintiffs chose to bring their claims as a collective action. They were not required to do so. As the named parties, they assumed the associated risks. Thus, I find nothing inequitable in assessing the costs against the named Plaintiffs"). Here, Defendants should not be forced to conduct discovery into the vast majority of Plaintiffs' claims because, despite having the opportunity to amend, they have each failed to present even one instance of working "'[forty] hours of work in a *given* workweek *as well as* some uncompensated time in excess of the [forty] hours.'" *Davis*, 765 F.3d at 242 (internal citations omitted).

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[1] Many of the cases Plaintiffs reference discuss burdens at trial, the sufficiency of evidence, and class-wide discovery. They are not relevant here even by tenuous analogy, with regard to whether each named Plaintiff has met his or her Rule 8 pleading burden. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) (holding that when an employer does not maintain adequate records, "an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference."); *Allen v. Bd. of Pub. Educ.*, 495 F.3d 1306, 1316 (11th Cir. 2007) (holding that plaintiffs presented "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.") (internal citation omitted); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472 (11th Cir. 1982) (finding that the testimony of 23 witnesses, including testimony about employment practices and hours worked at the various establishments, was sufficient to present a *prima facie* case on behalf of the class at trial); *Smith v. Lowe's Home Centers, Inc.*, 236 F.R.D. 354, 358 (S.D. Ohio 2006) (directing the parties "to confer with each other with a view to formulating an appropriate methodology for arriving at a meaningful sampling of the opt-in class for purposes of discovery."); *Adkins v. Mid-America Growers Inc.*, 141 F.R.D. 466, 468-69 (N.D. Ill. 1992) (finding that the magistrate judge erroneously permitted individual discovery in a class action after defendants deposed 81 known individual plaintiffs).

While Plaintiffs argue that the "logical limits" of Defendants' Motion would result in plaintiffs' inability to bring claims, they improperly focus on opt-in plaintiffs and misstate the standard. Defendants do not seek so to have Plaintiffs "list every instance of a workweek" where they seek overtime compensation, but rather the minimum pleading standard of *one* workweek in which they worked over 40 hours and were not paid overtime. And Defendants have said nothing about the burdens of absent putative opt-in plaintiffs in their Motion. If each named Plaintiff cannot do the minimal work necessary to state even one work week in which he or she alleges work over 40 hours without proper compensation at the pleadings stage, then there is no reason to expect that they can meaningfully participate in the much more burdensome work required in discovery and this litigation, including responding to written discovery, gathering relevant documents, participating in depositions, and, as necessary, participating in trial. Indeed, it is the unfortunate reality of FLSA collective actions that in the rush to try to increase leverage by roping as many people as possible into the litigation, the individuals on whose behalf the action is purportedly brought then often fail to satisfy basic discovery obligations. *See, e.g.*, *Anderson v. Cagle's Inc.*, 488 F.3d 945, 950 (11th Cir. 2007) (noting that over 100 opt-in plaintiffs had claims dismissed for failure to respond to discovery); *Bonds v. GMS Mine Repair & Maint., Inc.*, Civ. A. No. 13-1217, 2015 U.S. Dist. LEXIS 42992, at *4 (W.D. Pa. Apr. 1, 2015) (entering order to show cause as to why claims of 25 opt-ins should not be dismissed with prejudice for failing to respond to discovery); *Vargas v. Gen. Nutrition Ctrs., Inc.*, Civ. A. No. 10-867, 2014 U.S. Dist. LEXIS 119185, at *4 n.2 (W.D. Pa. Aug. 27, 2014) ("[Defendant] highlights that it has received written discovery responses from only seven of the fifty-nine Opt-in Plaintiffs it has served; that six . . . have either failed to appear at a deposition or cancelled his or her appearance; that two . . . failed to show for their depositions despite having confirmed their appearance; and that several . . . have engaged in repeated abuses of the discovery process which include refusing to stay for a deposition through its completion. . . The Court finds the conduct of those Opt-in Plaintiffs troubling"); *Zanes v. Flagship Resort Dev., LLC*, Civ. A. No.

09-3736, 2012 U.S. Dist. LEXIS 23083, at *11-12 (D.N.J. Jan. 30, 2012) (dismissing claims of FLSA plaintiffs who repeatedly failed to respond to discovery requests and comply with court orders); *Craig v. Rite Aid Corp.*, Civ. A. No. 08-2317, 2011 U.S. Dist. LEXIS 153670, at *12 (M.D. Pa. Nov. 8, 2011) (just under half of 50 individuals randomly selected for deposition did not cooperate).

There is no reason, then, to stretch beyond the bounds of established law to save the claims of 74 Plaintiffs here as Plaintiffs suggest only to postpone the inevitable. If Plaintiffs are allegedly too burdened to each state even a single fact in support of their individual claims, there is no reason to expect they would then be able to comply with the substantial discovery burdens that would follow, which would ultimately require dismissal anyway.

Therefore, Defendants' respectfully request that this Court dismiss Count II with prejudice as to all named Plaintiffs except for Nicole Tucker, Brenda Vera, and Jessica Marin, as Plaintiffs' opposition offers no authority to lessen the pleading standards for named Plaintiffs in putative collective actions as compared to individual actions.

B. Plaintiffs' State Law Claims Must Be Dismissed With Prejudice

Plaintiffs' state law claims in Counts III and IV must be dismissed as preempted. Plaintiffs do not dispute that they are relying on collective bargaining agreements as the basis for their WPCL claims and that they have not exhausted their administrative remedies.[2] The concession is fatal. Plaintiffs present no WPCL cases to support their argument that preemption-based dismissal requires discovery, and for good reason: the fact that the WPCL requires a contractual entitlement means that by their very nature WPCL claims require interpretation of the alleged contract, here the CBAs, for disposition.

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[2] Plaintiffs inaccurately and briefly assert that Defendants have not produced the CBAs in question, which is another basis for their argument discovery is required before dismissal. (*See* ECF 21 at p. 14). Perhaps Plaintiffs confuse this matter with another because Defendants indisputably provided the agreements Plaintiffs reference in their Amended Complaint as exhibits to their Motion to Dismiss. (*See* ECF 18-3). Plaintiffs' opposition does not dispute the authenticity of these CBAs, their applicability, or that the Court can consider them on this Motion.

The nature of the WPCL requires interpretation of the relevant contract because, as noted by the Court in its August 16, 2016 Memorandum Order, the WPCL "'does not create a right to compensation . . . .[r]ather, it provides a statutory remedy when the employer breaches a contractual obligation to pay earned wages. The contract between the parties governs in determining whether specific wages are earned.'" (ECF 12, at p. 12), *quoting De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 309 (3d Cir. 2003). While Plaintiffs argue that they did not bring a breach of contract claim, Counts III and IV are necessarily based on a contractual obligation that Plaintiffs allege has been breached. The WPCL simply provides additional remedies that would not have ordinarily been available for common law breach of contract actions, such as recovery of penalties and attorneys' fees, but otherwise is a contract enforcement statute at its core, as this Court recognized in its prior opinion. Given that indisputable truth, it is impossible that the CBAs could only be "tangentially involved" in this action. *See, e.g., Johnson v. Langer Tansport Corp.*, Civ. A. No. 15-1256, 2015 U.S. Dist. LEXIS 62604, at *11-12 (D.N.J. May 13, 2015) (granting motion to dismiss with prejudice state statutory claims for allegedly unpaid wages and overtime as preempted, reasoning, "Plaintiff alleges that various provisions of the CBA require Defendant to pay Plaintiff certain wages and that Defendant failed to pay him for certain regular and overtime hours worked. These core allegations . . . are founded directly on rights created by the CBA, specifically Plaintiff's right to be paid in accordance with the CBA's provisions"). Plaintiffs' opposition cites to cases for the broad proposition that if a claim exists absent the CBA, the claim may not be preempted by Section 301. But those cases are not relevant here, because, absent the CBAs, Plaintiffs have *no* other allegations of a contractual entitlement supporting their WPCL claims. And none of Plaintiffs' cited authorities concern WPCL or other analogous state law claims whose survival depends on breach of a contractual obligation.

Contrary to Plaintiffs' arguments, many cases support that *no* discovery is necessary to determine that Plaintiffs' state law claims are "inextricably intertwined" with the CBAs and thus preempted. *See Lynn v. Jefferson Health Sys.*, Civ. A. No. 09-6086, 2010 U.S. Dist. LEXIS 96378, at *15-17 (E.D. Pa. Sept. 15, 2010) (J. Rufe) (noting that where a collective bargaining agreement is the contract creating entitlement to wages, Section 301 of LMRA completely preempts WPCL claim); *Andrako v. U.S. Steel Corp.*, Civ. A. No. 07-1629, 2008 U.S. Dist. LEXIS 37617, at *23-24 (W.D. Pa. May 8, 2008) (J. Ambrose) (dismissing donning and doffing claim alleging unpaid wages in violation of the WPCL, reasoning that even though it "may not turn on an interpretation of a disputed provision in the CBA, it is squarely based on the CBA and, therefore, is preempted"); *Townsend v. BC Natural Chicken LLC*, Civ. A. No. 06-4317, 2007 U.S. Dist. LEXIS 8282, at *16-17 (E.D. Pa. Feb. 2, 2007) (J. Baylson) (dismissing donning and doffing claim alleging unpaid wages in violation of the WPCL because the alleged obligation to pay wages was based on the collective bargaining agreement, and the claim thus was preempted by Section 301); *Fulton v. Bell Atlantic Corp.*, Civ. A. No. 96-6874, 1997 U.S. Dist. LEXIS 1396, at *9-10 (E.D. Pa. Feb. 12, 1997) (J. Broderick) (finding WPCL claim necessarily arises from a breach of the CBA and triggers complete preemption under Section 301 where plaintiff is a member of union).

Accordingly, Counts III and IV of Plaintiffs' Amended Complaint are preempted by Section 301 of the LMRA and must be dismissed with prejudice.

III. CONCLUSION

Based on the foregoing and Defendants' Brief in Support of the Motion to Dismiss

Plaintiffs' Amended Complaint, Defendants respectfully request that the Court grant Defendants First Student Management LLC and First Student, Inc.'s Motion to Dismiss Count II of Plaintiffs' Amended Complaint as to all of the Plaintiffs except Nicole Tucker, Brenda Vera, and Jessica Marin with prejudice and Counts III and IV of the Amended Complaint as to all of the Plaintiffs with prejudice.

Respectfully submitted,

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Dated: December 19, 2016

CERTIFICATE OF SERVICE

I, Alexa J. Laborda Nelson, hereby certify that I caused a true and correct copy of the foregoing Reply Brief in Support of Motion to Dismiss Plaintiffs' Amended Complaint to be served via the CM/ECF system upon the following:

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